

**STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW**

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

v

**Michigan Supreme Court Docket No. 128913
Court of Appeals Docket No. 259519
Lower Court Case No. 96-013292-NI**

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.

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128913
of
**PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION
FOR LEAVE TO APPEAL**

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ARGUMENT

I.

THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION WHEN IT ENTERED AN ORDER OF DISMISSAL WITHOUT THE PRIOR APPOINTMENT OF A CONSERVATOR AND APPROVAL OF A BOND.

In this Court's December 28, 2005 Order, it requested that the parties file supplemental briefs regarding three issues. The first issue directed by the Court is whether "the circuit court had subject matter jurisdiction to approve the settlement and to enter an order of dismissal."¹ It is the Plaintiff's position that, although the circuit court had jurisdiction to approve the settlement on behalf of the minor child, it lacked subject matter jurisdiction to enter the order of dismissal under the circumstances presented in this case.

At the July 27, 1997 in camera hearing, Defendant's counsel stated that the purpose of the hearing was to facilitate a settlement of two cases which arose out of the same automobile collision. Norma Bierlein, the next friend appointed for her minor daughter, Samantha, gave testimony regarding Samantha's injuries, treatment and present condition, acting under the procedure set forth in MCR 2.420. After hearing the testimony, the court questioned the next friend regarding the minor child's physical condition.

The court then concluded that "the amount of the settlement in the gross amount of \$55,000.00 is fair, just and reasonable." (Transcript of hearing, July 28, 1997, **Exhibit A** to Application for Leave to Appeal, at 11). After the court determined the net distribution to the minor child, the court continued: "and I take it a conservator has been appointed." (Transcript of hearing July 28, 1997, at 11). At this critical juncture of the proceedings, the court received

¹ The remaining two issues – whether any other reason justifies relief from the order of dismissal, and whether the order of dismissal ought to be set aside in the exercise of this Court's inherent power to enforce its own rules, will be addressed in parts II and III of this brief.

the following response from Attorney Collison: “there will be one very shortly.” Having received something other than an unequivocal “yes” response and evidence that the appointment had in fact been made and bond determined, the circuit court had no further jurisdiction. Judge Meter could take no further action with respect to the order of dismissal which the Defendant’s attorney handed to him for entry. If the circuit court executed the order of dismissal, it was effectively determining that no conservator was required and no bond needed to be posted. This, however, was beyond the jurisdiction of the circuit court and was exclusively a matter for the probate court to consider (MCR 2.420 (B)(4)). Lacking subject matter jurisdiction over the issue of the appointment of conservator, who would be appointed, the conditions of the conservatorship and the amount of bond, if any, which would need to be posted, the court could not complete the settlement process and could not dismiss the case as it did.

Although the circuit court is vested with broad subject matter jurisdiction, the Michigan Constitution has vested exclusive jurisdiction in the probate court for matters pertaining to the property interests of minor children. Thus, the circuit court has original jurisdiction “in all matters not prohibited by law.” Const 1963, art 6 § 13.

The probate court, on the other hand, is granted original exclusive jurisdiction “in all cases of juvenile delinquents and dependents, except as otherwise provided by law.” Const 1963, Art 6 § 15. Michigan statutes likewise reserve jurisdiction over minors to the probate court. MCL Sec 700.1302(c). Under these general provisions, the circuit court has historically exercised very limited power regarding the affairs of a minor.²

Unlike other issues, subject matter jurisdiction may be raised at any time in a proceeding. The court on its own initiative may raise the issue. Once the court determines that it lacks

² MCR 2.420, first effective in 1985, presented a change in prior practice. Prior to 1985, all aspects of a minor’s settlement were handled by the probate court, including the decision as to the reasonableness of the settlement. After 1985, authority as to the question of “reasonableness” was given to the circuit court which presided over the case, on the belief that the trial judge would have greater familiarity with the injury and could best pass judgment on it for the minor’s protection.

subject matter jurisdiction, the court cannot act, even if the parties consent to the jurisdiction.

Warner v Noble 286 Mich 654; 282 NW 855 (1938).

In this case, the circuit court's lack of subject matter jurisdiction to enter the order of dismissal, as opposed to considering the fairness of the settlement, is not a mere technicality. As was previously briefed, and as will be briefed in more detail following, the condition precedent for entry of an order of dismissal could only be satisfied if the parties proceeded, as required under MCR 2.420, to the probate court for appointment of a conservator and posting of a bond. Having failed to take this critical step, the circuit court could take no further action as to the proposed settlement, and in particular, it could not dismiss the action.

Because the circuit court lacked jurisdiction to appoint a conservator or to approve a bond, no further proceedings were allowed in the circuit court. The Defendant's tender of a proposed order of dismissal, together with a check made payable to the next friend (which will be discussed below) and the Plaintiff's attorney, was premature and beyond the jurisdiction of the court to consider. Only after the probate court had completed its proceedings for appointment of conservator and determination of sufficient bond could the circuit court dismiss the case. Without the prior appointment of a conservator, the circuit court was without authority, or subject matter jurisdiction, to enter the Defendant's proposed order.³

II.

THE PAYMENT OF FUNDS TO A NEXT FRIEND DOES NOT CONSTITUTE SATISFACTION OF THE SETTLEMENT WHICH WAS APPROVED BY THE CIRCUIT COURT.

After the circuit court determined that the settlement was fair and reasonable and in the

³ As an aside, by 1997 – 12 years after adoption of the new settlement procedure – this requirement was well understood by the automobile insurers in Michigan and their regular trial counsel.

interests of the minor child, Defendant's counsel delivered a release and settlement draft to the Plaintiff's attorney. The check was made payable to "Norma Bierlein, next friend and Patrick Collison," the Plaintiff's attorney. As noted above, Plaintiff does not question the authority of the circuit court to consider whether the settlement was in the best interests of the minor child. MCR 2.420 provides the circuit court's authority in this respect.

However, the fact that the settlement amount was approved by the court on the testimony of the next friend did not authorize the Defendant to pay settlement funds to the next friend. Only a conservator, appointed by the probate court, could receive funds that were to be paid as consideration for the settlement and release.

MCR 2.201 provides for the appointment of a next friend. Although a conservator may bring an action on behalf of a minor child (MCR 2.201(E)), the circuit court is also authorized to appoint a "competent and responsible person" to appear as next friend on his or her behalf." MCR 2.201(E)(1)(b). The authority of the next friend, however, is limited. Although the next friend may prosecute the action through appeal, the next friend "may not receive money or property unless security, as determined by the court, is posted." (*Id.*)

In the present case, however, the circuit court did not reference MCR 2.201 and did not in any way authorize or direct the funds to be delivered to the next friend. To the contrary, the court made specific reference to the appointment of a conservator, which Plaintiff's counsel assured would be completed shortly.

The issue of improper payment of a settlement to a next friend has not been raised in this Court. The only reported case that could be found which has considered the issue, however, held that such payment would not support the satisfaction of a judgment. In Montgomery v Erie R. Co., 97 F2d 289 (3rd Cir 1938), the United States Court of Appeals for the Third Circuit, applying New Jersey law, held that because New Jersey law did not authorize a next friend of a

minor to “do more than prosecute to judgment or defend a suit to which the minor is a party,” payment to the next friend would not support satisfaction of a judgment. After reviewing the New Jersey statutes pertaining to minors, the court stated as follows:

“These sections provide a method for the payment and discharge of obligations due to minors to the end that **the minor may be assured of an honest administration of his funds during his minority. Minors are wards of the court and their rights must be guarded jealously.**” 97 F2d at 292 (Emphasis supplied)

Nor would the Montgomery Court accept the Defendant’s argument that payment to the Plaintiff’s attorney would constitute satisfaction: “We can see no reason for assuming that the authority of the attorney of record can rise higher than that of the next friend who engaged his services. No authority has been cited to us which supports such a proposition. In fact authority seems otherwise.” Id. ⁴

Almost 70 years have transpired since the Third Circuit’s decision in Montgomery v Erie R. Co., supra. During those years, the Michigan Court Rules and statutes pertaining to minor settlements, which are similar in purpose to the New Jersey statute, have undergone several revisions. However, when the 1997 settlement was approved in the present case and the order of dismissal was entered, the rules which governed a minor’s settlement were well established and directed to achieve a single purpose-- to protect the obligations due to minors so that they may be assured of an honest administration of their funds during minority. Having failed in this respect, the order dismissing the case must be set aside until such time as the Defendants pay the agreed-upon settlement to the minor child’s conservator.

Application of MCR 2.420 has been discussed in prior briefs. In interpreting and applying this court rule, it is important to keep in mind that this Court’s rules are subject to the

⁴ Interestingly, the Montgomery Court refused to even deduct from the judgment the amount which the Plaintiff would otherwise have been required to pay to the Plaintiff’s attorney as a fee. Instead, the court left this issue to the discretion of the trial court on remand.

same construction and application as this Court has established for statutes. Frank v William A. Kibbe & Associates, Inc. 208 Mich App 346; 527 NW2d 82 (1995). As with statutes, “the court should presume that every word has meaning and [should] avoid a construction which would render a statute, or any part of it, surplusage or nugatory.” Altman v Meridian Township 439 Mich 623, 635; 487 NW2d 155 (1992). Unless it is determined (and it can not be) that all procedural requirement mandated by MCR 2.420 have been met, the 1997 order of dismissal can not stand. Plaintiff Kirt Bierlein, as the newly appointed conservator for his daughter, is entitled to require enforcement of the settlement, with interest from the date of settlement.

III.

THE 1997 DISMISSAL BY THE CIRCUIT COURT SHOULD BE SET ASIDE BY THIS COURT IN EXERCISE OF ITS GENERAL POWERS OF SUPERVISION.

In establishing the Supreme Court of Michigan, the Michigan Constitution of 1963 provides specific direction to this Court to establish rules of practice and procedure which are to govern all courts of this state. (Const 1963, art 6 § 5).

In this case, several courts have already been requested to enforce the court rules which this Court has established. Although Circuit Judge Fred L Borchard determined that the 1997 settlement could not stand in view of the clear and unequivocal requirements for reviewing and concluding settlements for minor children, the court of appeals in Bierlien I⁵ and the circuit court in the present appeal declined to enforce those rules. A reading of their respective decisions would seem to indicate that there was an overriding concern that the Defendants ought not to pay a settlement twice. With that overriding concern in mind, these courts effectively chose to ignore the clear procedural requirements of MCR 2.420, which are intended for the protection of

⁵ The first appeal, Bierlein ex rel Bierlein v Schneider, 2004 WL 95185 (Mich Ct App 2004) was unpublished.

minors.⁶

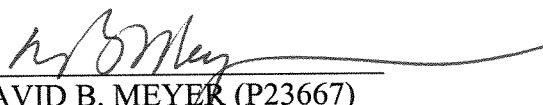
As has been previously briefed, the settlement procedures for a minor child are not advisory or discretionary. They are clear and unequivocal. If the responsible parties (court and counsel included) deviate from the rules, they do so at their peril, not the minor child's. It is submitted that the present case justifies entry of an order, pursuant to MCR 7.316(a) (7), setting aside the order of dismissal. Although MCR 7.316 authorizes this Court to grant relief without remand to the circuit court, the determination of the amount which is due to the Plaintiff, including interest from the time of settlement approval, is better left to determination by the lower court. However, no further proceedings should be required to determine whether the Plaintiff minor is entitled to the benefit of the protection afforded by MCR 2.420.

RELIEF

For the foregoing reasons, Plaintiff requests that this Court grant the application for leave to appeal from the lower court's order of November 15, 2004 or, in the alternative, that this Court issue a preemptory order, setting aside the order of dismissal, with further proceedings to enforce the approved settlement to occur in the circuit court.

Respectfully submitted,

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January 25, 2006

⁶ Although MCR 2.420 is intended to protect minor children whose interests are being litigated, the Rule secondarily also protects defendants who resolve claims either through settlement or judgment. If all procedural rules are followed, Defendants are protected from future claims brought by the minor after attaining the age of majority.